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80-2161

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MR. A'S RESTAURANT,

Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 12, 1981

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QUESTIONS PRESENTED[1]

1. Whether General Counsel bears the burden of proof that an employee's protected conduct is the dominant motive behind discharge in a dual motivation case.

2. Whether the Court of Appeals misapplied the standard of review of a National Labor Relations Board decision for each of the following reasons:

a. By failing to evaluate whether there was substantial evidence to support the Board's finding that the employer had transferred and threatened an employee in violation of 29 U.S.C. Section 158(a)(1) and (3).

b. By failing to evaluate whether there was substantial evidence to support the Board's finding that the employee had been accorded disparate treatment even though he was transferred to an equally prestigious work station.

c. By enforcing the Board's decision even though the Administrative Law Judge and the Board never evaluated whether a retaliatory motive was the dominant reason for discharge.

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[1] The parties to this proceeding are the National Labor Relations Board and Mr. A's Restaurant. The discharged employee is Mr. Mario Aguilar who is a member of Local 30, Hotel and Restaurant Employees and Bartenders of San Diego.

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TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, MR. A'S RESTAURANT, respectfully prays that a writ of certiorari issue to review the United States Court of Appeals for the Ninth Circuit's enforcement of an order of the National Labor Relations Board.

DECISIONS AND ORDERS BELOW

The unreported decision of the Administrative Law Judge dated January 4, 1980 appears in the separately presented Appendices as Appendix A. The reported decision and order of the National Labor Relations Board, which is officially reported at 248 NLRB No. 127 (1980), is Appendix B. The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit filed on March 20, 1981 is Appendix C. The judgment of the United States Court of Appeals for the Ninth Circuit docketed on April 10, 1981 and filed on May 6, 1981 is Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 20, 1981. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 160(e):

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole should be conclusive."

STATEMENT OF THE CASE

Petitioner operates a restaurant known as Mr. A's in San Diego, California. Mr. Mario Aguilar was employed as a waiter by Petitioner until his discharge on March 2, 1979. A charge was filed with the National Labor Relations Board ("Board") alleging discrimination in regard to the hire, tenure,

terms and conditions of employment of Mr. Aguilar. The charge went to hearing in January, 1980. The Administrative Law Judge concluded that the Petitioner, Mr. A's Restaurant, had violated the National Labor Relations Act by threatening reprisals of physical force against Mr. Aguilar for filing grievances and by transferring his work station and then discharging him for having filed grievances. Although Petitioner excepted to these conclusions, the Board adopted the Administrative Law Judge's recommended decision with one exception.[2] The Board's application for enforcement of the order was granted by the Ninth Circuit in its memorandum decision of March 20, 1981.

Three issues have been consistently raised at each stage of the proceedings. First, whether Mr. Aguilar was transferred from the Rotunda section of the restaurant to the Grill because he asked that a grievance be placed in his personal employment file for future reference. Second, whether Mr. Aguilar's discharge resulted from his filing a second grievance relating to lockers, station assignments, meals and uniforms. Third, whether the restaurant manager's statement that he wanted to "chop Mr. Aguilar's head off" was a threat of physical reprisal resulting from Mr. Aguilar's filing of grievances.

Mr. A's Restaurant contends that Mr. Aguilar was transferred to a more favorable station as part of the customary practice of the restaurant. Mr. Aguilar was eventually discharged because he misappropriated another employee's tip. His discharge had nothing to do with any grievances he had filed. In fact, the only grievance that was actually filed, the second grievance, was filed after his discharge. Finally, Mr. A's Restaurant contends that the statements of the manager were in no way related to grievances that might have been filed by Mr. Aguilar. In fact, there has been absolutely no evidence

[2] The Board found that the Administrative Law Judge had incorrectly concluded that the Rotunda of the restaurant carried prestige because it was at "the top." The Board determined that "the top" referred to the location of the Rotunda, not its desirability as a station.

presented which would suggest that the manager even knew of the existence of any grievances of Mr. Aguilar at the time the statement was allegedly made.

REASONS FOR GRANTING THE WRIT

A. FIRST QUESTION

The federal courts of appeals and the National Labor Relations Board disagree on what role a retaliatory motive must play in a dual motivation discharge case, and which party bears the burden of proof on that issue.

The First Circuit applies a "dominant motive" test that places the burden of proof of the dominant motive of discharge on General Counsel. *Coletti's Furniture, Inc.* v. *NLRB*, 550 F.2d 1292 (1st Cir. 1977); *NLRB* v. *Fibers International Corporation*, 439 F.2d 1311 (1st Cir. 1971). The Ninth Circuit has devised a "but-for" test that appears to place the burden of proof on General Counsel to show that the employee would not have been discharged but for engaging in protected conduct. *NLRB* v. *Adams Delivery Service, Inc.*, 623 F.2d 96, 99 (9th Cir. 1980); *Stephenson* v. *NLRB*, 614 F.2d 1210, 1213 (9th Cir. 1980). The Third Circuit has focused on the "real motive" for discharge, *NLRB* v. *Garry Manufacturing Co.*, 630 F.2d 934 (3d Cir. 1980); *Edgewood Nursing Center* v. *NLRB*, 581 F.2d 363, 368 (3d Cir. 1978), while the Fifth Circuit examines whether General Counsel has produced substantial evidence to show that an antiunion motive was "reasonably equal" to the employer's legitimate business justification. *NLRB* v. *Aero Corporation*, 581 F.2d 511, 514-515 (5th Cir. 1978). Although the tests in each circuit bear some similarities, they often lead to different conclusions. *E.g.*, *NLRB* v. *Houston Distribution Services, Inc.*, 573 F.2d 260, 265 (5th Cir. 1978), in which the court states it has not gone so far as to adopt the "but-for" test for determining union animus.

At the time the Board made its decision in this case,[3] the Board's standard in dual motivation cases required a showing by General Counsel that the discharge was "in part" motivated by protected conduct. *E.g., Youngstown Osteopathic Hospital Association,* 224 NLRB 574, 575 (1976). This is the standard that appears to have been applied in this case. The Administrative Law Judge did not specifically allocate the burden of proof to either party. However, he concluded that the discharge had been motivated by an intent to retaliate, and then examined whether Petitioner had demonstrated that the discharge resulted from misappropriation of a tip. Appendix A, pp. A13-A15.

The Administrative Law Judge prematurely shifted an evidentiary burden that should have remained with General Counsel until more than merely some evidence of improper motive had been established. The Ninth Circuit failed to address this issue in its memorandum decision (see discussion *infra* at p. 7), and the case should be remanded on that basis. Prior to remand, this Court should instruct the circuit courts and the National Labor Relations Board on what showing of motive is required in a dual motivation case and which party is to bear the burden of proof on that issue.

B. SECOND QUESTION

Supreme Court precedent is clear that the question of whether there is substantial evidence to support agency findings is ordinarily an issue to be resolved by the court of appeals.

[3] The Board's decision in the instant case is dated April 4, 1980. The Board's decision in *Wright Line,* 251 NLRB No. 150 (1980), is dated August 27, 1980. In *Wright Line,* the Board announces its decision to henceforth require General Counsel to prove that protected conduct was a motivating factor in discharging an employee, and if that showing is made, to shift the burden to the employer to show that the discharge would have occurred even in the absence of protected conduct. The *Wright Line* analysis is not significantly different from the test actually applied by the Administrative Law Judge in this case.

Universal Camera Corporation v. *NLRB,* 340 U.S. 474, 490 (1951). The Court will intervene only in rare instances when the standard of review appears to have been misapprehended or grossly misapplied. *Universal Camera Corporation, supra* at 491. Such is the case here.

The memorandum decision of the Ninth Circuit addresses only one of three issues raised by Petitioner — whether Mr. Aguilar was discharged because he filed grievances against his employer. The Ninth Circuit does not address whether there was substantial evidence to support the Board's finding that the transfer and threat to Mr. Aguilar were violations of the National Labor Relations Act. The court's wholesale failure to address two of three issues is a prima facie misapplication of the standard of review.

The Ninth Circuit's memorandum only addresses the substantial evidence to support findings relating to the motive of the employer. This Court has made it clear that in order for General Counsel to prove discrimination under Section 8(a)(3), General Counsel must establish both disparate treatment between an employee and his co-workers in discouragement of protected activities and that such disparate treatment was prompted by antiunion animus. *American Shipbuilding Company* v. *NLRB,* 380 U.S. 300, 311 (1965); *NLRB* v. *Brown,* 380 U.S. 278, 286 (1965). The Ninth Circuit nowhere addresses whether there was substantial evidence to support a finding that Mr. Aguilar's transfer could be considered disparate treatment. In fact, the evidence presented by Petitioner established that Mr. Aguilar was transferred to a station that was at least as profitable and probably significantly more profitable than his previous position. In addition, Mr. Aguilar's new station involved less work time, no greater amount of physical activity, and Mr. Aguilar was only one of three waiters transferred during the same period of time. Under these circumstances, there was no disparate treatment. The Ninth Circuit failed to address that issue.

Finally, the Ninth Circuit memorandum does not follow its own "but-for" analysis of discharge. *NLRB* v. *Adams Delivery Service, Inc.*, 623 F.2d 96, 99 (9th Cir. 1980); *Stephenson* v. *NLRB*, 614 F.2d 1210, 1213, (9th Cir. 1980). The Petitioner's evidence in this case established that Mr. Aguilar was discharged because he misappropriated another employee's tip. Further, Petitioner's evidence established that the grievance for which Mr. Aguilar was allegedly discharged was in fact not filed until after he had been terminated. Nonetheless, the Ninth Circuit upheld the Board's finding that the discharge was discriminatory. The Board's order was based upon the Administrative Law Judge's decision which simply concluded that the discharge of Mr. Aguilar "had been motivated" by an intent to retaliate against him for his having filed grievances. (Appendix A, p. A-13). Neither the Administrative Law Judge nor the Board addressed whether there was any evidence that the moving cause of the discharge was antiunion animus. The Ninth Circuit memorandum does not address the issue of whether the improper motive was the dominant motive or whether there was substantial evidence to support such a finding. Instead, the Ninth Circuit simply adopts the Board's decision which also failed to address this question.

This Court has frequenty stated that Congress has imposed on the court of appeals the responsibility for assuring that the Board keeps within reasonable grounds. Although the Board's findings are entitled to respect, they must be set aside when the record precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses, or its informed judgment on matters within its special competence or both. *E.g., Universal Camera Corporation* v. *NLRB*, 340 U.S. 470, 490 (1950). Careful consideration of all issues and a full review of the evidence before the Board is an essential part of the safeguarding process contemplated by Congress. The instant case is one in which the Ninth Circuit failed to properly scrutinize the Board's findings.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED: June 18, 1981

Respectfully submitted,

/s/

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Unreported Decision and Order of the Administrative Law Judge. Filed January 4, 1980.

APPENDIX B

Reported Decision of the National Labor Relations Board, 248 NLRB No. 127 (1980).

APPENDIX C

Memorandum Decision of the United States Court of Appeal for the Ninth Circuit. Filed March 20, 1981.

APPENDIX D

Judgment of the United States Court of Appeals for the Ninth Circuit. Docketed April 10, 1981. Filed May 6, 1981.

APPENDIX A

JD-(SF)-1-80

San Diego, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

MR. A'S RESTAURANT

and

HOTEL AND RESTAURANT EMPLOYEES
AND BARTENDERS UNION OF
SAN DIEGO, LOCAL 30

Robert R. Petering, Esq., of San Diego, Calif., appearing for the General Counsel.
Gray, Cary, Ames & Frye, by *Josiah L. Neeper* and *Daniel R. Carl, Esqs.*, of San Diego, Calif., appearing for the Respondent.

DECISION

Statement of the Case

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in San Diego, California, on August 14, 1979.[1] On May 17, the Regional Director for Region 21 of the National Labor Relations Board issued a complaint and notice of hearing, based upon an unfair practice charge filed on March 23, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act. All

[1] Unless stated otherwise, all dates occurred in 1979.

parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs, and upon my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

At all times material, Mr. A's Restaurant, herein called Respondent has been engaged in the preparation and service of meals to a public restaurant located in San Diego, California. In the course and conduct of these operations, Respondent annually derives gross revenues in excess of $500,000, and, further, annually purchases and receives goods valued in excess of $10,000 which originate outside the State of California. Therefore, I find, as admitted by the answer to complaint, that at all times material, Respondent has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

At all times material, Hotel and Restaurant Employees and Bartenders Union of San Diego, Local 30, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

Mario Aguilar, who had been employed by Respondent for approximately 4 years as a waiter, filed a grievance against Respondent on February 22. Shortly thereafter, he was transferred to a different work station in Respondent's restaurant. The General Counsel contends that on March 1, Aguilar filed a second grievance. It is undisputed that during the morning of March 2, Aguilar was terminated, although Re-

spondent contends that he had not filed his second grievance until the afternoon of March 2. It is also undisputed that on the morning of March 2, prior to the termination, as Aguilar had been standing with another waiter, Manager Joe Cutri[2] had walked by and had looked directly at Aguilar, saying, "You son-of-a bitch." When Aguilar stared at Cutri, the latter had said, "Don't look at me. Look another way. I want to chop your head off." The complaint alleged that the change in work station and the termination had been motivated by the grievance filed by Aguilar and had violated Section 8(a)(3) and (1) of the Act. It is further alleged that Cutri's remarks had referred to Aguilar's grievances and, accordingly, had constituted a threat of physical reprisal in violation of Section 8(a)(1) of the Act. Resolution of these allegations requires examination of four incidents: the grievance filed on February 22, the work transfer, the grievance of March and the termination of March 2.

With regard to the February grievance, the facts are undisputed. Respondent has maintained a collective-bargaining relationship with the Union for some time and is regarded by the Union as a "good house." Prior to the February grievance of Aguilar, there had never been a grievance filed against it. On February 16, a customer whom Aguilar had served walked out without paying the check. Aguilar reported this to Maitre d' Guiseppe Villani.[3] While it has been house policy for Respondent to pay for such "walk-outs," Villani, who knew the customer, suggested that Aguilar pay the check and receive reimbursement when Villani next saw the customer. At the end of the shift, Aguilar paid the bill, using his Visa card. However, based upon conversations with other employees concerning the normal policy regarding pay-

[2] It is admitted that at all times material, Cutri had been a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

[3] It is admitted that at all times material, Villani had been a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

ments for walkouts, and having not heard anything further from Villani about repayment, Aguilar and Attorney John Murcko prepared a grievance during the afternoon of February 21. When Aguilar took it to Respondent's facility, that same afternoon, majority shareholder and General Manager Dominick "Bud" Alessio[4] asked Aguilar to defer filing the grievance until Alessio had an opportunity to speak with Villani. Aguilar agreed to do so.

On the following morning, Villani came to Aguilar and tore up the yellow Visa copy, thereby, in effect, cancelling the charge to Aguilar's account. Nonetheless, Aguilar decided to submit the grievance for insertion in his personnel file, "to avoid in the future any more walkouts, any violation of the contract; paying walkouts from the employees." That same afternoon, he took the grievance to the office and requested that it be placed in his personnel file "for any reference in the future."[5]

With regard to the transfer of work location, the record shows that when Aguilar had commenced working for Respondent, he had been assigned, as are all beginning waiters, to a station in the bar and grill. After 4 months, he was transferred to the middle station in the dining room where he worked for approximately 1 year. He was then transferred to the rotunda station where he worked, Mondays through Fridays, until after he had filed the first grievance. As his testimony progressed, Aguilar became more and more confused concerning the precise date when he had been transferred from the rotunda to the bar and grill. Indeed, near the end of his

[4] It is admitted that at all time material, Alessio had been a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

[5] In his pretrial affidavit, Aguilar stated that he had submitted the grievance on February 23. However, any argument that this had been a more accurate statement than Aguilar's testimony, as to when the grievance had been submitted, is dispelled by Alessio's testimony that after his conversation in which he hdefer filing the grievance, Aguilar had "come back in the next day" and had turned in the grievance.

testimony, he acknowledged that he was "confused." The date I worked in the grill on — could be, like the 20th or 26th." Moreover, in his pretrial affidavit, he stated that "On February 26, around 10:30 a.m., when I arrived to work, Rudy told me I was going to work in the bar." Nevertheless, certain factors do exist which tend to support the conclusion that Aguilar's transfer had occurred on Friday, February 23, rather than on Monday, February 26.

When Aguilar was called upon to relate the date of his transfer to other events in this matter, he testified that he had been transferred on the morning following the afternoon on which he had filed the first grievance. That, of course, would have been on February 23. Moreover, while Villani acknowledged that he had been the one who had made the decision to relocate Aguilar's work station and that this change had occurred following the filing of Aguilar's first grievance, he did not dispute Aguilar's testimony that the transfer from the rotunda to the bar and grill had been made on the day following the filing of the grievance. Finally, although it is undisputed that Day Captain Rudolph Lawenda had been the official who had notified Aguilar of the transfer, Lawenda was never called as a witness by Respondent and, accordingly, there is no dispute from that quarter for Aguilar's testimony that the relocation had occurred on the day after he had filed his first grievance.[6] In sum, although Aguilar displayed confusion when questioned about the transfer with reference to precise dates, his testimony was clear when he was asked to relate the day of the transfer to the filing of his first grievance and Respondent presented no evidence to contradict Aguilar's testimony in that respect.

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[6] It is admitted that Lawenda had been a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act during the time that he had worked as a day captain for Respondent. While Alessio testified that Lawenda was no longer employed by Respondent at the time of the hearing, there was neither testimony nor a contention that Lawenda was not available to Respondent as a witness in this matter. However, no explanation was advanced for failing to call him.

With regard to the relative merits of working in the rotunda versus working in the bar and grill, Aguilar's testimony was not consistent. He claimed that whereas his tips in the rotunda had averaged $25 per day, they had only averaged $18 per day after he had been reassigned to the bar and grill. Yet, in his pretrial affidavit, he had stated that his tips for February 26, 27 and 28 had amounted to $22.50, $20 and $32, respectively. Moreover, both Villani and waiter Rolven Rodriguez testified that the bar and grill stations were more lucrative for tips than the rotunda because there was more customer turnover in the former. Nevertheless, there are certain troubling factors which emerge with regard to Aguilar's transfer to the bar and grill.

Second, it also appears that assignment to the rotunda station is viewed as being reserved for Respondent's more experienced waiters. Thus, Aguilar had worked at the middle station for a year before being relocated to the rotunda. More significantly, Rodriguez testified that after working at the middle station, he had been transferred "to the top. They call it the rotunda area." Consequently, it would appear that assignment to the rotunda carried a certain prestige in that the waiters viewed it as the "top" station in the restaurant.

Third, in the final analysis, whether Aguilar had been reassigned to the bar and grill on February 23 or on February 26, Villani never did explain why he had chosen to relocate Aguilar at that time. Villani claimed that he had periodically rotated waiters' stations. Yet, Respondent presented no evidence of any prior or subsequent station rotations. Indeed, it is undisputed that Aguilar had worked at the rotunda station for over 2 years prior to his late February transfer to the bar and grill. The only station relocations shown by the evidence presented involved progressive transfers from the bar and grill to the middle station and, finally, to the "top" station in the rotunda. There is no evidence of any station transfers being made in the opposite direction: from the rotunda to the middle station to the bar and grill.

Fourth, despite Villani's assertion that Aguilar's relocation in late February had been a normal rotation of waiters, the fact is that only three waiters had been relocated at that time. Obviously, the movement of Aguilar's station required some movement of other personnel to fill the vacancy created by Aguilar's relocation. Yet, the fact that only three waiters had been relocated hardly supports Villani's claims that he had effected a general rotation of stations. Moreover, Villani never chose to explain why, since only three waiters had been relocated, he had chosen Aguilar to be one of them. Certainly, it had not been occasioned by a need to insert a new waiter into the stations at the restaurant. Villani admitted that at that time, there "wasn't a new waiter that was brought up." Further, even had a new waiter been hired, that would not explain Respondent's resort to the abnormal procedure of reassigning an experienced waiter to the bar and grill which is normally the area to which newly hired waiters are assigned.

With regard to the second grievance, Aguilar began comparing the collective-bargaining agreement with conditions at Respondent's restaurant. He discussed the findings of his comparison with employees of both Respondent and of another restaurant where he worked during hours that he was not employed by Respondent. After conferring with Murcko, on March 1 Aguilar signed a grievance protesting various working conditions such as the absence of sufficient lockers, failure to assign stations by seniority, the quality of meals served employees, and the condition of uniforms provided employees. He testified that he had taken that grievance to Respondent's restaurant on the afternoon of March 1 where he had left it with Office Manager Betty Newton. Newton agreed that Aguilar had brought the grievance to her in the afternoon, but she testified that it had been terminated during the late morning of March 2, the date upon which he had delivered the second grievance to Respondent is of primary importance. Several factors tend to support Aguilar's testimony that he had delivered the grievance to Respondent on March 1.

First, Newton had no independent recollection as to the date upon which the grievance had been delivered. Her testimony that it had occurred on March 2 was based exclusively upon a memo which she had prepared, consistent with Respondent's policy of documentating receipt of notices, which bears the date "3/2/79."

Second, the memo prepared by Newton states, in part,

> When I took the slip he told me that he wanted to be sure that I understood that he had nothing against the Company and certainly nothing against Bud Alessio or Mr. John Alessio—they were fine people and fair—it was just Guiseppe who was unfair. This was repeated many times, as if he wanted me to be sure I understood.

As will be discussed, *infra*, it had been Bud Alessio who had terminated Aguilar on March 2. In view of Aguilar's contention that his termination had been unjust and unlawful, as evidenced by the filing of the charge in this matter, it hardly would have made any sense for him to have characterized Bud Alessio as being a "fine" person and as being "fair" approximately 5 hours after the discharge. In short, the substance of Aguilar's words to Newton are simply not consistent with post-discharge delivery of the grievance. Rather, they are more consistent with the situation of an employee who is filing a grievance, but wishes to remain on good terms with the employer to avoid retaliatory consequences.

Third, in this same vein, the grievance makes no mention of Aguilar's discharge. Surely had he been terminated before its preparation and delivery he would have included that as being one of the matters under dispute. Certainly it is unlikely that he would have omitted any mention whatsoever of it, had the discharge occurred prior to the filing of the grievance, considering his assertion that his termination had been unlawfully motivated.

Fourth, as set forth above, on the morning of March 2, Cutri assailed Aguilar, called the latter a "son-of-a-bitch" and threatening "to chop your head off." In its brief, Respondent

argues that it has not been shown that Cutri's comment had been related to Aguilar's grievance-filing. Yet, neither has it been shown that Cutri could have been referring to anything other than the second grievance filed by Aguilar. Certainly, the February 22 grievance was somewhat remote in time to have been Cutri's concern. Respondent neither called Cutri as its witness nor did it contend that it was unable to do so. There is no independent evidence that Cutri and Aguilar had been at odds prior to March 1, nor is there any other reason, so far as the record discloses, for Cutri to have been angered at Aguilar on the morning of March 2. Accordingly, there is no basis for inferring other than that Cutri had been referring to the second grievance filed by Aguilar. That being the case, the grievance had to have been filed prior to March 2. Moreover, as will be discussed in greater detail, *infra*, certain undisputed remarks made by Villani to Aguilar following the termination show that the grievance had been filed prior to the termination.

Finally, Kenneth E. Walden, an employee of another employer, testified that he had been the one who had driven Aguilar to Murcko's office to pick up the grievance and that he had then driven Aguilar to Respondent so that the grievance could be filed. Walden testified that the grievance had been delivered to Respondent on March 1 and, further, that it would not have been March 2, "because I was off that day. I'm off on Fridays."[7]

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[7] In its brief, Respondent attempts to attack Walden's credibility by arguing that the timing of his working hours renders implausible his testimony concerning the date of his trips to Murcko's office and to Respondent. However, to do this, Respondent relies upon the schedule that Aguilar had worked for Walden's employer. In point of fact, there is no evidence regarding the hours that Walden had been working and, accordingly, it cannot be said that his schedule would have precluded him from driving Aguilar to Murcko's office and then to Respondent on March 1. In this respect, it should be noted that Walden, unlike Aguilar, worked a split shift. Thus, it cannot be concluded that his working hours were the same as those of Aguilar. Furthermore, Aguilar testified that his reasons for obtaining transportation that afternoon from Walden had been that he had wanted to show the grievance to Walden, with whom he had previously discussed the

(Footnote continued on following page)

Finally, with regard to the March 2 termination, Aguilar testified that after he had reported for work that morning and had been the object of Cutri's remark, he had been terminated by Alessio, during a conversation in which Villani had been present. This is undisputed. It is also undisputed that during that conversation, Alessio had confronted Aguilar with the merchant's copy of a Visa slip on which Aguilar had striken the word "captain" from the tip portion of the slip, thereby claiming the $1 tip, allocated initially to the captain, for himself as waiter.

Aguilar testified that Villani and Alessio had approached that morning and that the latter had produced the slip, asking for an explanation of the deletion. According to Aguilar, when he had explained that Lawenda, the captain involved, had given him permission to strike the word Alessio had replied "We keep track on your checks and you have been doing this lately." When, testified Aguilar, he had replied that he had done so only with Lawenda's permission, Alessio had announced, "You are fired, Mario. You are fired." Alessio had then walked away. Both Alessio and Villani testified that when the former had asked for an explanation, Aguilar had remained mute. Alessio, who had made the termination decision, testified that in view of Aguilar's failure to advance an explanation, he had decided to terminate him for, in effect, stealing. Yet,

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(Footnote continued from preceding page)

matters that were to become the subject of the grievance. Accordingly, the fact that Aguilar could have driven to Murcko's office in his own vehicle does not render implausible the testimony that Walden had done the driving that afternoon. Finally, the fact that Walden had once been refused employment by Respondent does not tend to show bias on his part against Respondent in the circumstances of the case. For, Walden had filed his application with Respondent approximately 4 years prior to the hearing in this matter and, consequently, the incident is somewhat remote. More significantly, his application had been rejected because Respondent "had plenty of people." Thus, it was not rejected for any reason that reflected adversely upon Walden's capabilities, nor was the reason one that would likely give rise to hostility against Respondent by Walden. Walden appeared to be a credible witness and I credit his testimony.

several factors serve to undermine Respondent's defense that Aguilar had been discharged for having preempted the Lawenda's portion of the tip.

First, Aguilar testified that it had been a common practice of the waiters to strike the portion of the tip allocated to the captain on credit card sales whenever the tip allocated to the waiter had been "real cheap." He further testified that he had done this on five prior occasions during the time that he had worked for Respondent, but that he had always notified Lawenda of what he had done. None of this testimony was disputed by Respondent. Alessio testified that he did not "think" that such a practice had been occurring. But, Lawenda was not called to refute Aguilar's description of the practice and there is no contention that he had been unavailable as a witness to Respondent, despite the termination of his employment. Moreover, even assuming that Lawenda had not been available to Respondent as a witness, it still could have produced Captain Bruce King to refute Aguilar's description of this practice. Yet, it did not do so.

Second, with respect to the particular charge slip that had occasioned Aguilar's termination, the latter testified that he had secured Lawenda's specific consent to the deletion and change, because the cashier had refused to accept the charge slip until Lawenda had given consent.[8] Of course, Lawenda was not called to refute this testimony. Neither did Respondent seek to ascertain the identity of the cashier nor attempt to call a cashier to controvert Aguilar's description of this incident. In short, Aguilar had been authorized to claim Lawenda's portion of the tip.

Third, following Alessio's departure on March 2, there had been a conversation between Villani and Aguilar. The latter testified that Villani had produced the March 1 grievance and

[8] Both in a pretrial affidavit and when he testified initially, Aguilar claimed that the customer had provided only $1 tip for the waiter, whereas, in fact, the customer had written $2 as the tip for the waiter and $1 as the tip for the captain. Despite this discrepancy, it still was not illogical for Aguilar to have felt that he had been undertipped, and for Lawenda to have agreed, considering that the amount of the check had been $28.57.

had asked "Why you do this to the boss? You have went too far." Aguilar testified that when he had inquired why his station had been transferred to the bar and grill, Villani had responded, "I do this for your own good until things calm down." Villani denied having seen the March 1 grievance prior to Aguilar's discharge, but he did not deny having made the remarks, attributed to him by Aguilar, about the reason for having changed the latter's work station.

Villani agreed that he had asked, "Why would you ever be unhappy? You have your problems. We could resolve this problem between us without going that far." According to Villani, Aguilar had replied, "I'm sorry. I made a mistake. I started. I can't stop it." On direct examination, Villani claimed that he had been referring to the "transaction . . . crossing out the tips that belong . . . to the captain." Pressed on cross-examination for a more complete explanation, he claimed that Aguilar had also had problems with service and with his attitude toward other employees. Yet, he then conceded that such things "can happen at any minute to anybody, you know. A good day, a bad day." In short, Villani conceded that these were no more than normal, common occurrences. Indeed, Alessio testified that he would, in the normal course of affairs, have learned of any complaints about employees, but acknowledged that he could not recall having heard any about Aguilar's performance as a waiter. In the end, Villani testified that the decision had been the sole reason for the termination. Thus, Villani's own description of his conversation with Aguilar makes no sense unless Villani had been referring to the grievances. In referring to a problem that could be resolved "between us without going this far," Villani could hardly have been referring to a single instance of deletion of the word captain from a single charge slip. Certainly, Aguilar's response, as described by Villani ("I started. I can't stop it."), could hardly have pertained to a lone incident. Consequently, Villani's own testimony tends to confirm that Respondent's motive in terminating Aguilar had been to retaliate against him for having filed a second grievance.

Fourth, Villani's account of how the deletion had come to his attention is uncorroborated and is at odds with other evidence in this case. Villani claimed that he had overheard Lawenda complaining to other waiters about the loss of the dollar. Yet, neither Lawenda nor any waiter was called to corroborate this testimony by Villani. Moreover, Alessio testified that the food checker would have caught the deletion, but had not called it to his attention. Seemingly, therefore, there would have been no impropriety inasmuch as it was not called to Alessio's attention. This tends to corroborate Aguilar's testimony that Lawenda had specifically consented to the change when the slip had been rejected initially. That being the fact, it hardly makes sense for Lawenda, as Villani claimed, to later have been complaining about the change on the slip.

Nor was Alessio's testimony supported by corroborative evidence. He claimed that on the morning of March 2, he had found a slip and certain other documents on his desk. He testfied that he had then called the captain — either Lawenda or King — to ascertain the identity of the waiter involved. Yet, not even King was called to testify whether or not he had been the captain with whom Alessio had purportedly spoken that morning and, if so, to corroborate Alessio regarding the substance of their conversation. Moreover, Alessio conceded that the food checker would have known of the deletion. Yet, she was not called as a witness by Respondent and no explanation was advanced for failing to call her. Thus, unexplained is why she had not called the deletion to Alessio's attention if she had thought that an impropriety had occurred.

IV. Analysis

In the final analysis, this case permits no conclusion other than that the transfer and subsequent discharge of Aguilar had been motivated by an intent to relatiate against him for spoiling Respondent's record with the Union by having filed grievances. Within, at most, two working days of his insistence that his first

grievance be included in his personnel file, to become a matter of record in the event of future adverse action against him, Aguilar had been transferred from a station at which he had been working for over 2 years to one which is used for novice waiters, thereby causing him to lose a prestigious station and impressing upon him the adverse consequences which could flow from filing grievances against Respondent. Whether or not his tips were diminished as a result of this transfer is not the point. "An unlawfully motivated transfer does not shed its discriminatory nature merely because the transferee is not disadvantaged thereby." (Citation omitted.) *Occidential Paper Corporation,* 227 NLRB 719, 722, n. 7 (1977). The transfer to the bar and grill station was abrupt. It was unprecedented, so far as the record discloses, for an experienced waiter to have been transferred to a station in the bar and grill. It is undisputed that Villani had admitted that it had been made "until things calm down." So far as the record discloses, the only upsetting event to which Villani could have referred was Aguilar's insistence upon the inclusion of his grievance in his personnel file. That being the fact, Villani's statement constituted "an outright confession of unlawful discrimination which eliminated any question concerning the intrinsic merits . . . or other causes suggested as the basis for the transfer." NLRB v. *L.C. Ferguson,* 257 F.2d 88, 92 (C.A. 5, 1958); *see also, NLRB* v. *John Langenbacher Co.,* 398 F.2d 459, 463 (C.A. 2, 1968), *cert. denied,* 393 U.S. 1049 (1969). In any event, the defense advanced by Respondent was vague, unsupported and cannot be credited.

I further conclude that a preponderance of the evidence establishes that Aguilar had filed his grievance on March 1. While it is true that he was not precise concerning specific dates when he testified, it was my impression that this was no more than "confusion as to details." See *NLRB* v. *International Longshoremen's and Won, Local 10, et al.,* 283 F.2d 558, 563 (C.A. 9, 1960). As discussed above, the circumstances of the grievance and its substance tend to support his testimony that he had filed it on March 1. Walden credibly corroborated

Aguilar's account that the grievance had been filed on March 1. So far as the record discloses, Cutri's hostile remarks on the following morning could only have referred to that grievance and, accordingly, constitute a threat in violation of Section 8(a)(1) of the Act. Finally, Villani's own account of his remarks, during his post-discharge conversation with Aguilar, could only have referred to the grievances filed by Aguilar and thus tend to corroborate the latter's account that Villani had referred a preponderance of the evidence supports the conclusion that Aguilar had filed his second grievance on March 1.

Finally, a preponderance of the evidence supports the allegation that Aguilar had been terminated in retaliation for having filed a second grievance so shortly after having filed the initial grievance against Respondent. Villani's remarks following the discharge, as credibly related by Aguilar, constitute an admission to the effect. Cutri's comments demonstrate Respondent's hostility toward Aguilar for his grievance. The discharge followed abruptly after the grievance had been filed. Respondent's defense in this regard, as in other regards, was not corroborated by Lawenda nor by the food checker. See *Colorflo Decorator Products, Inc.*, 228 NLRB 408, 410 (1977). That it was a common practice for waiters to lay claim to the captain's share of the tip whenever a tip was meager is undisputed. That Aguilar had secured Lawenda's consent to transfer the $1 to Aguilar was not challenged. Therefore, I find that Respondent seized upon a perfectly normal practice and has attempted to use it to cloak its true motive for terminating Aguilar: that it was dissatisfied with the grievances which he had filed and had decided to terminate the possibility of his filing future grievances by terminating Aguilar.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Mr. A's Restaurant, set forth above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relation to

trade, traffic and commerce among the several states, and tend to lead, and have lead, to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Mr. A's Restaurant is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel and Restaurant Employees and Bartenders Union of San Diego, Local 30 is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening reprisals of physical force against employees for filing grievances, Mr. A's Restaurant has violated Section 8(a)(1) of the Act.

4. By transferring an employee's work station and then discharging him for having filed grievances, Mr. A's Restaurant violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Mr. A's Restaurant engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Mr. A's Restaurant will be required to offer Mario Aguilar immediate reinstatement to his former position of employment as a waiter assigned to the rotunda station or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing, if necessary, anyone who may have been assigned or hired to perform the work that he had been performing prior to

his February, 1979, transfer to the bar and grill station. Additionally, Mr. A's Restaurant will be required to make Aguilar whole for any loss of earnings he may have suffered by reason of his unlawful transfer to the bar and grill station and subsequent termination, with backpay to be computed on a quarterly basis, making deductions for interim earnings, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on different grounds, 322 F.2d 913 (C.A. 9, 1963) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

Mr. A's Restaurant, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening to exercise physical force against employees because they file grievances.

(b) Transferring and discharging or otherwise discriminating against employees with regard to hire or tenure of employment of any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

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[9] General Counsel's request for a remedial interest rate of 9 percent on the backpay is denied. *See Southern California Edison Company*, 243 NLRB No. 62, n. 1 (1979).

[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Mario Aguilar immediate and full reinstatement to his former position as a waiter assigned to the rotunda station, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that he had been performing prior to his February, 1979, transfer to the bar and grill station, or, if his former position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make Aguilar whole for any loss of pay he may have suffered as a result of his discriminatory transfer and discharge, in the manner set forth above in the section entitled "The Remedy."

(b) Preserve and make available to the Board of its agents all payroll and other records necessary to compute the backpay and reinstatement rights set forth in "The Remedy" section of this Decision.

(c) Post at its San Diego, California, restaurant, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 21, after being duly signed by its authorized representative, shall be posted by Mr. A's Restaurant immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to

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[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees are customarily posted. Reasonable steps shall be taken by Mr. A's Restaurant to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated: January 4, 1980

/s/

William J. Pannier III
Administrative Law Judge

APPENDIX B

FJP

248 NLRB No. 127

D—6212
San Diego, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MR. A'S RESTAURANT

and

Case 21—CA—17656

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION OF SAN DIEGO, LOCAL 30

DECISION AND ORDER

On January 4, 1980, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[1] We agree that Respondent violated Sec. 8(a)(3) and (1) by transferring Aguilar from the rotunda to the bar and grill. In this conclusion, the Administrative Law Judge found that the rotunda assignment carried a certain prestige, based on employee Rodriguez' testimony that the rotunda was at "the top" of the restaurant. However, the record indicates that Rodriguez was merely referring to the physical location of the rotunda and not to the desirability of the assignment. Therefore, we do not rely on the Administrative Law Judge's characterization of that testimony.

Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mr. A's Restaurant, San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. April 4, 1980

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(Seal) NATIONAL LABOR RELATIONS BOARD

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. MR. A'S RESTAURANT *Respondent.*	**No. 80-7392** **NLRB No. 21-CA-17656** **MEMORANDUM**

On Application for Enforcement of an Order of the National Labor Relations Board Argued and Submitted March 2, 1981

Before: HUG and NELSON, Circuit Judges, and EAST*, District Judge.

The Board found that respondent violated section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (3), by transferring, threatening, and later discharging Mario Aguilar for filing grievances.

The filing of a grievance is a protected right under the Act, and an employer commits an unfair labor practice when it discharges an employee for exercising grievance rights. *Ad Art, Inc.* v. *NLRB*, No. 78-3371, slip op. t 1284 (9th Cir. Dec. 9, 1980). Under our limited standard of review, the determination of motive is a matter particularly within the purview of the Board. *Clear Pine Mouldings, Inc.* v. *NLRB*, 632 F.2d 721, 726 (9th Cir. 1980). The findings of the Board concerning respondent's unlawful retaliatory motive are supported by substantial evidence, *NLRB* v. *Adams Delivery Service, Inc.*, 623 F.2d 96 (9th Cir. 1980), and therefore the order of the Board is ENFORCED.

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. MR. A'S RESTAURANT, *Respondent.*	No. 80-7392

JUDGMENT

Before: HUG and NELSON, Circuit Judges, and EAST*, District Judge.

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated April 4, 1980, against Respondent, Mr. A's Restaurant, San Diego, California, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on March 2, 1981, and has considered the briefs and transcript of record filed in this case. On March 20, 1981, the Court being fully advised in the premises, issued its memorandum granting enforcement of the Board's Order. In conformity therewith, it is hereby ORDERED AND ADJUDGED by the Court that:

Respondent, Mr. A's Restaurant, San Diego, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to exercise physical force against employees because they file grievances.

* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

(b) Transferring and discharge or otherwise discriminating against employees with regard to hire or tenure of employment of any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activities protected by Section 7 of the National Labor Relations Act, (hereinafter called the Act.)

(c) In any like or related manner interfering with, restraining or coercing the employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which has been found necessary to effectuate the policies of the Act:

(a) Offer Mario Aguilar immediate and full reinstatement to his former position as a waiter assigned to the rotunda station, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that he had been performing prior to his February, 1979, transfer to the bar and grill station, or, if his former position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make Aguilar whole for any loss of pay he may have suffered as a result of his discriminatory transfer and discharge, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy," (attached hereto marked Appendix A).

(b) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay and reinstatement rights set forth in the "The Remedy" section of this judgment.

(c) Post at its San Diego, California, restaurant, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 21, (Los Angeles, California) of the National Labor Relations Board after being duly signed by its authorized representative, shall be posted by Mr. A's

Restaurant immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Mr. A's Restaurant to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this judgment, what steps have been taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:

JUDGES:

/s/
PROCTER HUG, JR., CJ

/s/ Richard H. Deane
Richard H. Deane
Clerk

/s/
DOROTHY W. NELSON, CJ

A TRUE COPY

/s/
WILLIAM G. EAST, DJ

5 — June 1981

ATTEST: Richard H. Deane
Clerk

/s/
Oscar Tagle
Deputy Clerk.

FILED
JUL 17 1981
STEVAS,
CLERK

No. 80-2161

In the Supreme Court of the United States

OCTOBER TERM, 1980

MR. A'S RESTAURANT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by transferring, threatening, and subsequently discharging employee Mario Aguilar for filing grievances.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C-1) is unreported. The decision and order of the National Labor Relations Board (Pet. App. A-1 to A-19 and B-1 to B-2) are reported at 248 N.L.R.B. 990.

JURISDICTION

The judgment of the court of appeals (Pet. App. D-1 to D-3) was entered on March 20, 1981. The petition for a writ of certiorari was filed on June 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment * * * to * * * discourage membership in any labor organization * * *.

STATEMENT

1. Adopting the decision of the administrative law judge, the National Labor Relations Board found that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by transferring, threatening, and subsequently discharging employee Mario Aguilar for filing grievances (Pet. App. B-1 to B-2). The evidence on which the Board's findings are based showed that Mario Aguilar had been a waiter at petitioner's restaurant for approximately four years at the time of his transfer and subsequent discharge. Upon being hired, Aguilar was assigned to work in the bar and grill, which is the station to which all beginning waiters are assigned. Thereafter, Aguilar was progressively moved to the dining room and, finally, to the rotunda, where he worked for two years until he was transferred and then discharged (Pet. App. A-2, A-4; Tr. 7, 46-50).[1]

On February 16, 1979,[2] one of Aguilar's customers walked out of the restaurant without paying his check. Aguilar reported this to his "maitred," Guiseppe Villani, who suggested that Aguilar pay the bill and told Aguilar that he would reimburse Aguilar after he got the money from the customer, whom he knew. Aguilar agreed and paid

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[1]"Tr." refers to the transcript of the hearing before the administrative law judge. "GCX" refers to the exhibits introduced by the General Counsel at that hearing.

[2]All dates referred to in this brief are in 1979 unless otherwise noted.

the bill with his own credit card (Pet. App. A-2 to A-3; Tr. 11-13, 128-129).

Aguilar did not hear from Villani over the next few days, and became concerned about receiving his reimbursement. In discussing the matter with other waiters, Aguilar learned that the collective bargaining agreement required the restaurant management to cover for unpaid checks. Thereafter, on February 21, Aguilar consulted with an attorney and had a grievance prepared over the petitioner's failure to cover for the unpaid check. That afternoon, Aguilar brought the grievance to the restaurant's office. General Manager Dominick Alessio asked Aguilar to defer formally filing the grievance until after he had had an opportunity to straighten out the matter with Villani. Aguilar agreed (Pet. App. A-3 to A-4; Tr. 13-17, 160-161, GCX 2).

On the morning of February 22, Villani informed Aguilar that his credit charge had been cancelled and that the unpaid check was not Aguilar's responsibility. However, Aguilar decided that he wanted to have his grievance on file in order to avoid having the same problem arise in the future. Accordingly, Aguilar brought his grievance to the restaurant's office that afternoon and requested that it be placed in his personnel file for future reference (Pet. App. A-3; Tr. 17-19, 161). The following morning, February 23, Aguilar was informed that he had been transferred out of the rotunda and back to the bar and grill. The decision to transfer Aguilar had been made by Villani; Aguilar was not given an explanation for the change in his work station (Pet. App. A-4 to A-5; Tr. 19-20, 23, 138-139).

Over the next week, Aguilar compared the terms of the collective bargaining agreement with working conditions at the restaurant, and uncovered a number of areas which he believed were not in conformance with contractual requirements. Aguilar had a second grievance prepared alleging contract violations with regard to lockerroom conditions,

station assignments, meals and uniforms, and brought it to the restaurant's office on the afternoon of March 1 (Pet. App. A-7; Tr. 24-29, 95-98, GCX 3).

The following morning, March 2, Aguilar was approached by the restaurant's manager, Joe Cutri, who confronted Aguilar and stated, "You son-of-a-bitch." Aguilar stared at him, suprised by the outburst, and Cutri responded, "Don't look at me, look another way. I want to chop your head off" (Pet. App. A-3, A-10; Tr. 30).

A short time later, Aguilar was approached by Alessio and Villani. Alessio informed Aguilar that he was fired because he had taken a one dollar tip left to the captain, Rudy Lawenda, for himself (Pet. App. A-10; Tr. 32-34, 132-133, 151, 155).[3] Alessio then walked away, and Villani and Aguilar continued the discussion. Villani, referring to the grievance, asked Aguilar, "Why you do this to the boss? You have went too far. Why would you ever be unhappy?" Aguilar answered that he was sorry, but that he had already started and could not stop it now. Aguilar then asked Villani why he had been transferred to the bar and grill, and Villani stated that he had done it for Aguilar's own good "until things calm down" (Pet. App. A-11 to A-12, A-15; Tr. 34-35, 134-135).

2. At the hearing before the administrative law judge, petitioner contended that Aguilar had been discharged because he had appropriated Lawenda's tip for himself, and that his transfer had been in keeping with normal practice. The judge rejected both arguments.

In finding that petitioner unlawfully discharged Aguilar, the administrative law judge noted that Villani admitted that Aguilar's grievance had been the motivating factor for

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[3]Aguilar had Lawenda's permission to take the one dollar tip in question, since the waiter's tip had been small; this was a common practice in the restaurant (Pet. App. A-11, A-15; Tr. 36-38).

the discharge (Pet. App. A-15). Thus, Villani, in plain reference to the grievance, asked Aguilar "[w]hy you do this to the boss?" and told Aguilar that he "went too far" by filing his grievance (*id.* at A-11 to A-12). In addition, the judge did not credit the testimony of petitioner's office manager, Betty Newton, that Aguilar had not filed his second grievance until after his discharge (*id.* at A-8 to A-9). Thus, as shown above, Villani referred to the grievance in his conversation with Aguilar, and admitted that he knew about the second grievance prior to the discharge (Tr. 135).[4] Finally, the judge rejected petitioner's claim that Aguilar had been discharged for taking Lawenda's tip. The judge noted that it was a common practice in the restaurant for waiters to take the captain's share of a tip whenever the waiter's tip was small, and that in this instance Aguilar had "secured Lawenda's consent" to take the one dollar tip. Accordingly, the judge concluded that petitioner "seized upon a perfectly normal practice and has attempted to cloak its true motive for terminating Aguilar" (Pet. App. A-15).

With regard to the transfer, the administrative law judge found that the timing and abruptness of the change shortly after Aguilar had filed his first grievance supported the conclusion that the transfer was unlawfully motivated. In addition, the judge noted that Villani's admission to Aguilar that he had been transferred "until things calm down" constituted "an outright confession of unlawful discrimination" (Pet. App. A-13 to A-14). Finally, the judge rejected petitioner's asserted defense that the transfer was a normal business practice, since the record showed that it was "unprecedented" for an experienced waiter to move back to the bar and grill (*id.* at A-14). The judge concluded (*id.* at

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[4]The judge also found (Pet. App. A-15) that Cutri's remarks were in reference to the grievance and were unlawful threats of reprisal in violation of Section 8(a)(1) of the Act. See *NLRB* v. *Adams Delivery Service, Inc.*, 623 F. 2d 96, 99 (9th Cir. 1980).

A-13) that "the transfer and subsequent discharge of Aguilar had been motivated by an intent to retaliate against him for * * * having filed grievances."

3. The court of appeals upheld the Board's decision and enforced its order. The court observed (Pet. App. C-1) that "the determination of motive is a matter particularly within the purview of the Board" and concluded that the "findings of the Board concerning [petitioner's] unlawful retaliatory motive are supported by substantial evidence."

ARGUMENT

Petitioner asks this Court to grant certiorari to resolve a conflict among the circuits as to the standard to be applied in discriminatory discharge cases when there is evidence that an employer had both proper and improper motives for the discharge (Pet. 4-5). However, that question is not presented on this record. The Board's finding here, which was affirmed by the court of appeals, was that petitioner was not motivated by a valid (non-pretextual) reason in transferring and subsequently discharging Aguilar. The sole basis for those discriminatory acts was to retaliate against him for filing grievances. Thus, the only question presented in this case is whether substantial evidence supports the Board's finding that the business considerations advanced for the transfer and discharge were a pretext, and not a motive, for those actions. That evidentiary issue does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Contrary to petitioner's assertion (Pet. 5), the Board did not improperly place the burden of proof on petitioner.[5]

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[5]In *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169 (1980), the Board announced its new test for considering Section 8(a)(3) discharge cases to conform to the analysis set forth by this Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252

The General Counsel made a *prima facie* showing that the transfer and discharge were discriminatorily motivated—by proving that both actions came within one day of Aguilar's filing of a grievance, that both were abrupt, and that Villani admitted that both were the result of the grievances.

Accordingly, the burden of proof shifted to petitioner to establish that it had a legitimate business reason for the transfer and discharge. As the Board found, petitioner failed to sustain its burden. The evidence did not support petitioner's contention that Aguilar was transferred as a normal business practice. Petitioner did not establish that it was a normal practice to rotate waiters periodically (Pet. App. A-6), and Villani had no explanation for either the timing of the transfer or the selection of Aguilar for transfer (*id.* at A-6 to A-7). Indeed, there was no evidence that a waiter had ever previously been transferred from the rotunda station back to the bar and grill (*id.* at A-6).

Similarly, petitioner failed to prove that Aguilar had been discharged for taking Lawenda's one dollar tip. The undisputed evidence showed that it was common practice for waiters to take for themselves the tip allocated for the

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(1977). Under the *Wright Line* approach, the General Counsel has the initial burden to make a *prima facie* showing "sufficient to support the inference" that a discharge was unlawfully motivated. The burden then shifts to the employer to demonstrate that the employee would have been discharged "even in the absence" of the unlawful reason; that is, that there was a legitimate business reason for the discharge. *Wright Line, supra*, 105 L.R.R.M. at 1175. As the Board noted, however, if an examination of the employer's evidence reveals that "the asserted justification is a sham in that the purported rule or circumstance * * * did not exist, or was not, in fact, relied upon" (*id.* at 1170), it is apparent that the unlawful motivation was the only reason for the discharge. Since, in this case, the Board found (Pet. App. A-15) that petitioner's asserted reason for the discharge was merely an attempt to "cloak its true motive for terminating Aguilar," no question of dual motivation is presented. See *NLRB* v. *Nevis Industries, Inc.*, 647 F. 2d 905, 909-910 (9th Cir. 1981) (adopting the *Wright Line* test).

captain, and that Aguilar in this instance had secured Lawenda's permission to take the one dollar tip for himself. In these circumstances, the evidence clearly established that petitioner "seized upon a perfectly normal practice" as a "cloak" and that its true motive for transferring and then discharging Aguilar was to retaliate against him for filing grievances (Pet. App. A-15).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Contrary to petitioner's contention (Pet. 6-7), the court of appeals clearly addressed the issues in this case and concluded that the Board's findings of "unlawful retaliatory motive are supported by substantial evidence" (Pet. App. C-1). Given the Board's finding that petitioner's claimed motive was a sham, there was no occasion for the Board or court to determine whether it was the dominant motive.

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